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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92075375
Party	Defendant Ethan Van Sciver and Antonio J. Malpica
Correspondence Address	SCOTT HOUTTEMAN HOUTTEMAN LAW LLC PO BOX 370 MERRIFIELD, VA 22116-0370 UNITED STATES Primary Email: scott@houtteman.com Secondary Email(s): AntonioJMalpica@gmail.com 202-263-0808
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Filer's Name	Scott Houtteman
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Signature	/Scott Houtteman/
Date	08/19/2021
Attachments	ReplyToOppo.pdf(208380 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

COMMON SENSE PRESS INC DBA POCKET JACKS COMICS Petitioner-Plaintiff v. ANTONIO J. MALPICA, and ETHAN VAN SCIVER Registrants-Defendants	Cancellation No. 92075375

REGISTRANT'S REPLY

Co-Defendant Ethan Van Sciver, through counsel, replies to the opposition brief of Petitioner Common Sense Press Inc dba Pocket Jacks Comics ("CSP"). 20 TTABVUE. Defendant will not repeat arguments made in its opening brief, nor will he respond to unfocused arguments or arguments that depend upon obvious mischaracterizations of Defendant's positions.

I. SERVICE OF THE MOTION

Petitioner CSP correctly notes that it was not served a copy of Defendant's motion on August 2, 2021. (Defendant's counsel mistakenly believed that, like the federal courts, service could be effected via the Board's ESTTA filing system, as shown by the wording of his certificate of service.) But Petitioner concedes it was alerted by the filing by the ESTTA system on August 2 and obtained a copy shortly thereafter. Defendant's counsel only learned of the issue when it received Petitioner's Opposition Brief on August 18, 2021.[1] Defendant immediately served Petitioner and filed a corrective certificate of service on the same date.

[1] Petitioner's counsel was aware, as early as April 15, 2021 and certainly by Aug. 2, 2021, that it was not receiving emails of the motions but he obtained copies from the TTAB docket and chose not to educate Defendant's counsel until the filing of its brief in opposition on Aug. 18.

The Board has the power to address motions with service issues. See *Coffee Studio LLC v. Reign LLC*, 129 USPQ2d 1480, 1482 n.7 (TTAB 2019). In a similar circumstance, a petitioner's acknowledged failure of service was excused because the petitioner acted promptly to cure its defective filing by its amendment of the proof of service before any deadlines had passed. *Equine Touch Foundation, Inc. v. Equinology, Inc*, 91 USPQ2d 1943 (TTAB 2009) Here, the failure of service was corrected in 16 days and the non-moving party has pointed to no prejudice caused by this delay. Indeed, it filed its responsive motion five (5) days early, before its August 23 deadline.

II. AUTHENTICATION OF PETITIONER'S ADMISSIONS

Petitioner has not pointed out any inaccuracies in the exhibits made of record. But it did argue, without citation to precedent, that these admissions are "likely hearsay" and that "the 'evidentiary exhibits' are not properly authenticated, introduced, or otherwise stipulated to by the parties." 20 TTABVUE 10, 11-12.

Petitioner is correct about one point, the discovery period as not yet begun. Accordingly, the parties have had yet no opportunity to stipulate to authenticity or, failing that, answer requests for admissions as to document authenticity. Accordingly, the Board must take judicial notice of the public record as pointed out in Defendant's brief. 18 TTABVUE 2.

Should the Board be reluctant to take judicial notice, the Board could impose a short stay so that the parties can meet and confer to obtain a stipulation of accuracy or, alternatively, the Board can authorize a limited discovery for purpose of requests for admissions for authenticating documents. This is appropriate when the Board's jurisdiction is at issue. *See* Defendant's Brief, 18 TTABVUE 10. Also, it affords Petitioner the opportunity to submit any material it believes pertinent to defend the motion to dismiss.

But Petitioner is flirting with the boundaries of legal ethics with this stubborn refusal to acknowledge authenticity. Prolonging this proceeding in order to force formal authentication procedures—when Petitioner knows all of the admissions and other exhibits are 100 percent

accurate—is to cause unnecessary delay and needlessly increase the cost of litigation in violation of Fed. R. Civ. Pro. 11(b)(1).

III. CONCLUSION

In view of the above, Defendant renews his motion requesting the Board (1) find CSP's applications, Ser. No. 88/872,841, filed April 15, 2020 and Ser No. 88/925,542, filed May 20, 2020 void *ab initio* because Petitioner CSP is not the proper party with the intent-to-use the mark Comicsgate, (2) dismiss this cancelation proceeding because without its Comicsgate applications Petitioner CSP has no statutory cause of action and (3) take any other action the Board finds just and proper.

Dated: August 19, 2021

Respectfully Submitted,

/s/ Scott Houtteman

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing REPLY has been served by email to: Francis John Ciaramella, Esquire at frank@fjcpllc.com on August 19, 2021.

/s/ Scott Houtteman